Protecting privacy. Promoting transparency.

Order F14-25

MINISTRY OF JUSTICE
(OFFICE OF THE SUPERINTENDANT OF MOTOR VEHICLES)

Hamish Flanagan
Adjudicator

July 25, 2014

CanLII Cite: 2014 BCIPC No. 28
Quicklaw Cite: [2014] B.C.I.P.C.D. No. 28

Summary: The Office of the Superintendent of Motor Vehicles, which is part of the Ministry of Justice, withheld portions of its Adjudication Procedures Manual that outlines possible grounds for successfully reviewing an impaired driving prohibition. The Ministry submitted that release of the information could reasonably be expected to harm a law enforcement matter under s. 15(1)(a) of FIPPA. The adjudicator found that the OSMV adjudicator function of reviewing impaired driving prohibitions did not qualify as a "law enforcement" function as defined in FIPPA. The Ministry also did not establish that disclosure of the information could reasonably be expected to harm the enforcement of the impaired driving prohibition regime for the purposes of s. 15(1)(a) of FIPPA. For these reasons the information must be disclosed.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, s. 15(1)(a).

Authorities Considered: B.C.: Order F11-13, 2011 BCIPC 18 (CanLII); Order F07-15, 2007 CanLII 35476 (BC IPC); Order 00-18, 2000 CanLII 7416 (BC IPC); Order 00-10, 2000 CanLII 11042 (BC IPC).

Cases Considered: *British Columbia (Minister of Citizens' Services) v. British Columbia (Information and Privacy Commissioner),* 2012 BCSC 875; *Lavigne* v. *Canada (Office of the Commissioner of Official Languages)*, [2002] 2 S.C.R. 773.

INTRODUCTION

[1] The applicant lawyer requested information from the Office of the Superintendent of Motor Vehicles[1] ("OSMV"), part of the Ministry of Justice ("Ministry"), about the review process for a type of impaired driving prohibition peace officers may issue to impaired drivers under the *Motor Vehicle Act*. A driver who has been issued an impaired driving prohibition may elect to have an OSMV adjudicator review that prohibition.

[2] The Ministry released some records to the applicant but withheld others. The applicant requested that the Office of the Information and Privacy Commissioner ("OIPC") review the Ministry's decision to withhold some records. During mediation by the OIPC, the Ministry changed its grounds under the *Freedom of Information and Protection of Privacy Act* ("FIPPA") for withholding information from s. 13 to ss. 15 and 22, and released some additional information.

[3] The applicant requested an inquiry, but then confirmed that she no longer seeks the information withheld under s. 22. The remaining issue is whether the Ministry is authorized to refuse to disclose withheld portions of the OSMV Adjudication Procedures Manual ("Adjudication Manual") because disclosure could reasonably be expected to harm a law enforcement matter under s. 15(1)(a) of FIPPA.

ISSUE

[4] The issue in this inquiry is whether disclosure of withheld information in the Adjudication Manual could reasonably be expected to harm a law enforcement matter under s. 15(1)(a) of FIPPA.

DISCUSSION

Records in issue

[5] The withheld information is contained in one section of the Adjudication Manual titled "Grounds for Review of Impaired Driving Prohibitions". This information contains examples of scenarios that have been, and may again be, accepted by OSMV adjudicators as legitimate reasons to quash an impaired driving prohibition.

[1] Renamed RoadSafetyBC effective May 30, 2014.

[6] **Harm to Law Enforcement**—Section 15(1)(a) of FIPPA reads as follows:

> 15(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to
>
> (a) harm a law enforcement matter

[7] The first step in considering whether s. 15(1)(a) of FIPPA applies to the information in the Adjudication Manual is to decide whether OMSV adjudicator reviews of impaired driving prohibitions constitute "law enforcement". The second step is to consider whether disclosure of the information could reasonably be expected to cause harm to law enforcement.

Do reviews of impaired driving prohibitions constitute "law enforcement"?

[8] Schedule 1 of FIPPA defines "law enforcement" as:

> (a) policing, including criminal intelligence operations,
>
> (b) investigations that lead or could lead to a penalty or sanction being imposed, or
>
> (c) proceedings that lead or could lead to a penalty or sanction being imposed.

[9] The Ministry argues that OSMV adjudicators fall within paragraph (c) of the definition of law enforcement[2] and point to examples of the various functions OSMV adjudicators perform where they can impose and vary penalties, for example suspending driver licences. However, the applicant says that the focus must be on whether OSMV adjudicators are within the definition of law enforcement solely in relation to their function of reviewing impaired driving prohibitions.

[10] In Order F11-13,[3] Adjudicator Fedorak considered the question of whether coroners' investigations constitute "law enforcement". He noted that previous orders, with one exception, had found that they did not, because coroners were not empowered to impose penalties or sanctions. He determined however, that coroners' investigations did constitute "law enforcement" in circumstances where a coroner's investigation forms part of, or leads to, a criminal investigation by police.

[2] Ministry initial submissions, at para. 4.34.
[3] 2011 BCIPC 3 (CanLII).

[11] I adopt the same approach as Adjudicator Fedorak in Order F11-13, namely to consider the function of OSMV adjudicators in relation to the particular records in issue, rather than to decide whether OSMV adjudicators generally serve a "law enforcement" function.[4]

[12] Like coroners, OSMV adjudicators fulfill several functions. The only OSMV adjudicator function that is relevant to the records in issue here is the function of reviewing impaired driving prohibitions. This is because the withheld information relates solely to the OSMV adjudicator function of reviewing impaired driving prohibitions.

[13] Considering the precise nature of OSMV adjudicator reviews, I am not satisfied that the OSMV adjudicators review function constitutes "law enforcement" for the purposes of FIPPA. A driver who has been issued an impaired driving prohibition may elect to have an OSMV adjudicator review that prohibition. The review cannot disadvantage the applicant, operating as a second look whether the prohibition imposed has legitimate grounds to support it. To use the words of the Ministry's submission, the review gives "a summary avenue of redress to a driver in a case where the peace officer was wrong in issuing the prohibition".[5] Sections 215.3 and 215.5 of the *Motor Vehicle Act* prescribe the possible outcomes of a review of an applicant's impaired driving prohibition. The possible outcomes are either that the review is successful, in which case the prohibition is quashed (or in certain cases under s. 215.5, the prohibition period reduced), or unsuccessful, in which case the prohibition remains. In my view, in none of these scenarios is the review process a "proceeding that leads or could lead to a sanction being imposed on an individual" as set out in the FIPPA definition of "law enforcement". I reach this conclusion because the sanction has already been issued by the peace officer, and the adjudicator's function is only to retain the status quo or to quash or reduce the prohibition. On the plain and ordinary meaning of the words in paragraph (c) definition of "law enforcement" in FIPPA, this function is not a proceeding that leads or could lead to a sanction being imposed on an individual.

[14] However, my finding that the review of impaired driving prohibitions function does not fall within the definition of law enforcement does not necessarily mean that s. 15(1)(a) does not apply. Section 15(1)(a) only requires that the release of the records harm law enforcement, and the Ministry argues that release of the withheld information could harm not just the OSMV adjudicator's review process but also peace officers' issuance of impaired driving prohibitions.

---

[4] This approach is also consistent with the approach to whether s. 15 applied to the OSMV in Order 00-18, 2000 CanLII 7416 (BC IPC), at para. 21.

[5] Ministry's initial submission, para. 4.57.

[15] Peace officers issue impaired driving prohibitions to drivers, and there is no question that peace officers issuing impaired driving prohibitions fall within the FIPPA definition of law enforcement. Therefore, if release of the withheld information would cause harm to peace officers' ability to issue impaired driving prohibitions, the records may be withheld. I will now consider this argument.

Would release of the information reasonably be expected to harm a law enforcement matter?

[16] The standard of proof applicable to harms-based exceptions is whether disclosure of the information could reasonably be expected to cause the specified harm. Although there is no need to establish certainty of harm, it is not sufficient to rely on speculation.[6] In Order F07-15, former Commissioner Loukidelis outlined the evidentiary requirements to establish a reasonable expectation of harm:

> …there must be a confident and objective evidentiary basis for concluding that disclosure of the information could reasonably be expected to result in harm… Referring to language used by the Supreme Court of Canada in an access to information case, I have said 'there must be a clear and direct connection between disclosure of specific information and the harm that is alleged'.[7]

[17] Further, in *British Columbia (Minister of Citizens' Services) v. British Columbia (Information and Privacy Commissioner),*[8] Bracken, J. confirmed it is the release of the information itself that must give rise to a reasonable expectation of harm, and that the burden rests with the public body to establish that the disclosure of the information in question could result in the identified harm.

[18] I take the same approach in assessing the Ministry's application of s. 15 to the information.

[19] The Ministry's submission regarding harm to peace officers is that release of the information will allow individuals to tailor their interactions with peace officers so that there are insufficient grounds to issue an otherwise valid prohibition. It says this in turn will allow those individuals to return to the road and put the public at potential risk.

---

[6] Order 00-10, 2000 CanLII 11042 (BC IPC), at p. 10.
[7] Order F07-15, 2007 CanLII 35476 (BC IPC), at para. 17. Referring to *Lavigne* v. *Canada (Office of the Commissioner of Official Languages)*, [2002] 2 S.C.R. 773.
[8] 2012 BCSC 875, at para. 43.

[20] Regarding harm to peace officers' ability to issue impaired driving prohibitions, the applicant says that the type of information withheld is already generally publicly available in court decisions and that police investigatory techniques are well known and publicized. The applicant also says that the fact that a defence succeeds in one case does not necessarily mean it will succeed in another.

[21] Disclosure of the information in issue will provide the public with knowledge of scenarios that have been, and may again be, accepted as legitimate reasons to quash a driving prohibition. I do not accept that releasing this information harms law enforcement. A member of the public armed with this knowledge can know whether they and a peace officer are conducting themselves in a manner that is within the limits of the law. If anything, it can enhance effective law enforcement because it means an individual can assess whether they and the peace officer are acting in a way that is legally defensible, which I note could reduce the likelihood of a prohibition needing to be revoked.

[22] The Ministry submits that release of the information will allow individuals to tailor their interactions with peace officers so that there are insufficient grounds to issue an otherwise valid prohibition. However, in my view disclosure of the information could not reasonably be expected to cause harm in this way because peace officers are able to adapt and respond to the actions of an individual as needed during an interaction. If an individual attempts to tailor their interactions with peace officers so that there are insufficient grounds to issue an otherwise valid prohibition – assuming that were possible – peace officers can adapt their interactions with the individual as necessary to ensure that they are able to legitimately issue a driving prohibition where they consider that is warranted. This type of dynamic interaction with a member of the public would not be a unique or unusual scenario for a peace officer. Peace officers interact every day with members of the public who have a greater or lesser knowledge of the state of the law. Further, without disclosing the withheld information, in my review of the manual in issue I saw examples of this process of adaption of policing techniques in response to successful reviews of driving prohibitions. This adaption process allows peace officers to counter attempts to construct a scenario to avoid a driving prohibition.

[23] I also note that several of the scenarios in the manual are not within the control of a member of the public, but are reliant on certain actions being taken or not taken by a peace officer or some other circumstance occurring that is outside the control of any individual. Therefore, I am not satisfied that there is a reasonable expectation that disclosure of the withheld information could result in individuals constructing their interactions with peace officers so that peace officers cannot issue otherwise valid driving prohibitions.

[24] The applicant states that some information about the state of the law relating to driving prohibitions is already publicly available in the *Motor Vehicle Act*, in court decisions and in published guidance. The Ministry agrees this sort of information is publicly available, but counters that the information in issue here is different because it contains specific examples of successful reviews. It says these specific examples could reasonably be expected to harm policing with respect to the issuance of prohibitions. However, the Ministry has provided me with no evidence how the allegedly more specific information would do so. I also note there is no evidence before me that the information presently available has resulted in harm to law enforcement seeking to administer the driving prohibition regime.

[25] For the above reasons, I am not satisfied that disclosure of the information could reasonably be expected to cause harm to a law enforcement matter for the purposes of s. 15(1)(a) of FIPPA.

CONCLUSION

[26] I require the Ministry to give the applicant access to the withheld information by **September 9, 2014**. The Ministry must concurrently copy me on its cover letter to the applicant, together with a copy of the record.

July 25, 2014

ORIGINAL SIGNED BY

Hamish Flanagan, Adjudicator

OIPC File No.: F13-54171
F13-52702